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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 493

HARRY SLATKIN BUILDERS, INC., *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Harry Slatkin Builders, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on June 14, 1956.

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court of the United States, entered March

31, 1955, is reported in 14 T.C.M. 7. The judgment of the Circuit Court of Appeals is reported in 235 F. (2d) 189 and is printed as Appendix B hereto, *infra*, p. 4a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1956, and is set forth in Appendix B hereto, *infra*, p. 4a. Petitioner's petition for rehearing was denied on July 11, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

QUESTIONS PRESENTED

Two questions are presented for review:

I. Tax Effect of Liquidation of Real Estate Investment by Piecemeal Sales.

Was the petitioner, by reason of its liquidation of a real estate investment by piecemeal sales, considered as having held such real estate primarily for sale to customers in the ordinary course of its trade or business so as to preclude the gain on such sales from qualifying for the treatment provided by section 117(j) of the Internal Revenue Code of 1939?

II. Scope of Review of Tax Court Decision.

Was a conclusion by the Tax Court, based upon determined facts, that petitioner held certain housing units primarily for sale to customers in the ordinary course of its trade or business within the meaning of section 117(j)(1)(B) of the Internal Revenue Code of 1939, a finding of fact to be reviewed under the limitations of Rule 52(a) of the Federal Rules of Civil Procedure, or was it a conclusion of law?

STATUTES INVOLVED

The statute involved is section 117(j) of the Internal Revenue Code of 1939, which is printed in Appendix A hereto, *infra*, pp. 1a-2a. Substantially the same statutory provision, relating to current taxable years, is provided in section 1231 of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

The basis of the jurisdiction of the Court of first instance, the Tax Court of the United States, was a petition filed by the taxpayer, pursuant to section 272 of the Internal Revenue Code of 1939, for a redetermination of deficiencies assessed by the Commissioner of Internal Revenue for the calendar years 1946, 1947, 1948, and 1949.

Petitioner hereby agrees to and adopts the Counter-Statement of Facts submitted to the Sixth Circuit by respondent in its brief in opposition to petitioner's appeal from the Tax Court's decision, with the addendum that petitioner's officer and General Manager, Irvin Hermanoff, testified that the Detroit project was initiated "because I thought it would be a good policy to invest in rental housing" (27a*), that he testified that the decision to file applications toward the end of 1942 for the construction of the duplex houses was "for the purpose of building up an investment portfolio" (37a), and that, when asked if the original purpose was to rent them all, he answered, "That is correct." (40a) This removes any grounds for conflict over facts and removes any possible speculation as to the basis for the Tax Court's decision or its affirmance by the Sixth Circuit. The facts thus agreed to, as stated in respondent's Counter-Statement of Facts, are set

* This and other similar references are to pages of the Appendix to Appellant's Brief in the Sixth Circuit proceedings.

forth in Appendix C hereto, *infra.* pp. 5a-14a. The following is a summary of this statement of the facts:

In 1941 petitioner began the construction of one-family houses for sale. In 1943 petitioner submitted three applications to the War Production Board for the construction of 42 duplex buildings comprising 84 family dwelling units in Detroit, Michigan. Under wartime regulations such units could be disposed of only to war worker occupants, or to eligible war workers if sold within a specified time after completion. Only one-third of the houses could be sold under the second alternative. On October 15, 1945, all Government restrictions on sale of the units were removed.

In its applications to the WPB with respect to the Detroit project, petitioner requested that rental rates be established for the dwelling units and that a sales price be set for 22 of the dwelling units.

Construction of the first 44 units was completed between September 1943 and January 1944. Construction of the remainder was completed between June and December 1944. Prior to completion of the units covered by the first application, petitioner requested, and was granted, permission to rent the 22 units for which a sales price had originally been set.

Application to construct 22 duplex buildings comprising 44 family dwelling units in Dearborn, Michigan, was approved September 7, 1943. All 44 of these units were constructed by petitioner and rented by it, and are still being rented by it.

Of a total of 82 units constructed in the Detroit project, only two were sold in 1944 and three in 1945, and those were sold because of title difficulties and the poor condition of the units themselves.

The Detroit project brought in less than half the net return per unit of the Dearborn project because of a higher tax rate and because the tenants in the Detroit units paid little or no attention to maintenance of the premises and disregarded the efforts of petitioner's caretaker to maintain the properties. Because of this lack of care, petitioner's officers concluded that the Detroit project was deteriorating rapidly and that the net return was even less than that shown by the books. Late in 1945 or early in 1946, petitioner's officers decided to dispose of the properties of the Detroit project, and entered into an oral agreement with a real estate broker to sell the units in the Detroit project. Two "for sale" signs were erected on the project, giving only the name and telephone number of the broker. Of the 77 dwelling units, 73 were sold in 1946, one in 1947, one in 1948, and two in 1949.

Since early 1946 petitioner has initiated a number of projects for the construction of rental units, including the creation of three subsidiaries which have built and rented apartment units costing, in the aggregate, one million dollars. No dwelling units constructed and rented by petitioner or its subsidiaries have ever been sold subsequent to their rental, except those in the Detroit project.

The Commissioner of Internal Revenue determined that petitioner's gain on the disposition of the 77 units in the Detroit project in 1946-1949 was ordinary income, and the Tax Court upheld this determination by finding that during 1946-1949 the units in the Detroit project were held by petitioner primarily for sale to its customers in the ordinary course of its trade or business.

The basis for the Tax Court's decision appears to have been its conclusion that: "The activities of petitioner and of the broker acting on its behalf in disposing of the Detroit units were sufficient to constitute a trade or business." (16a) This conclusion, in turn, appears to have been based upon the following finding:

> "There can be no question but that the sales by the petitioner were frequent, continuous and substantial in 1946, since 73 out of 77 units were disposed of in that year, 59 of them in the first seven months and 71 of the 77 by the broker. Although the sales activities by the petitioner in connection with the disposal of the properties were apparently limited to turning the matter over to a real estate broker and to a reliance upon two roadside signs for advertising purposes, it seems evident that a ready market existed and the absence of a more extensive sales campaign is therefore immaterial. *Nathan D. Goldberg, supra.*" (15a)

As its sole grounds for affirming the decision of the Tax Court, the Sixth Circuit stated, ". . . it appearing that this is a question of fact, . . . And it appearing that the findings of the Tax Court are not clearly erroneous; . . ." The Sixth Circuit thus adopted the conclusions of law of the Tax Court as its own.

REASONS FOR GRANTING THE WRIT

I. ON THE QUESTION OF THE TAX EFFECT OF LIQUIDATION OF REAL ESTATE INVESTMENT BY PIECEMEAL SALES

A. There is a conflict among Circuits

Section 117(j) of the 1939 Code (and section 1231 of the 1954 Code) provide that, if the aggregate of a taxpayer's gains upon sale or exchange or involuntary

conversion of "property used in the trade or business" exceed its losses from such transactions during a taxable year, all such transactions, gain and loss alike, shall be treated as sales or exchanges of capital assets. Conversely, if the losses exceed the gains, none of the gains or losses shall be considered as arising from sales or exchanges of capital assets. For purposes of this provision "property used in the trade or business" means real property and property subject to the allowance for depreciation, if held for more than six months and if not inventory, a copyright or artistic composition under certain specified circumstances, or "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business."

1. There is a conflict among Circuits as to the meaning of the exclusionary clause under section 117(j)(1)(B): "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business", as applied to piecemeal sales of investments in real estate, including such sales from rental housing projects of the type involved in this case.

The decisions of the Sixth and Ninth Circuits have made the test of "continuity and frequency of sales" virtually the sole criterion in the application of section 117(j)(1)(B) where the liquidation is the result of a voluntary decision of the taxpayer. The result is almost automatically to place the voluntary piecemeal liquidation of any real estate investment of substantial size within the ambit of "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business", since prompt liquidation in small units or lots *inevitably* results in meeting the continuity and frequency test which appears to

be controlling in these Circuits. *Homann* v. *Commissioner,* 230 F. (2d) 671 (CA 9th, 1956); *Pacific Homes, Inc.* v. *United States,* 230 F. (2d) 755 (CA 9th, 1956); *Doughterty* v. *Commissioner,* 216 F. (2d) 110 (CA 6th, 1954); *Palo Verdes Corp.* v. *United States,* 201 F. (2d) 256 (CA 9th, 1952); *Rollingwood Corp.* v. *Commissioner,* 190 F. (2d) 263 (CA 9th, 1951).

This was the result in petitioner's case. In affirming the Tax Court's decision in petitioner's case in the manner in which it did (Appendix B, *infra,* p. 4a), the Sixth Circuit has necessarily adopted the conclusions of law of the Tax Court as its own.

The Ninth Circuit has made an exception only in the case of an involuntary disposition. *McGah* v. *Commissioner,* 210 F. (2d) 769 (CA 9th, 1954).

In remanding the case to the Tax Court for additional findings of fact, the Sixth Circuit indicated, in *Winnick* v. *Commissioner,* 199 F. (2d) 374 (CA 6th, 1952), an awareness of certain factors other than continuity and frequency of sales, but the additional factors mentioned would not preclude a conclusion that the housing units were held primarily for sale to customers in the ordinary course of the taxpayer's trade or business by reason of the liquidation of the investment.

In conflict with the foregoing, the Third, Fifth, Seventh, and Eighth Circuits and the Court of Claims have permitted the realization of the value of real estate properties through piecemeal liquidation without the taxpayer being treated as having held such properties primarily for sale to customers in the ordinary course of his trade or business, if the sales activity in connection with this liquidation did not constitute a business. *Curtis Company* v. *Commissioner,* 232 F. (2d) 167 (CA 3rd, 1956); *Goldberg* v. *Commissioner,*

223 F. (2d) 709 (CA 5th, 1955); *Smith* v. *Dunn*, 224 F. (2d) 353 (CA 5th, 1955); *Consolidated Naval Stores Co.* v. *Fahs*, 227 F. (2d) 923 (CA 5th, 1955); *Chandler* v. *United States*, 226 F. (2d) 403 (CA 7th, 1955); *McConkey* v. *United States*, 130 F. Supp. 621 (Ct. Cls., 1955); *Dillon* v. *Commissioner*, 213 F. (2d) 218 (CA 8th, 1954); *Garrett* v. *United States*, 120 F. Supp. 193 (Ct. Cls., 1954); *Delsing* v. *United States*, 186 F. (2d) 59 (CA 5th, 1951); *Fahs* v. *Crawford*, 161 F. (2d) 315 (CA 5th, 1947).

Among the foregoing decisions, *Curtis Company* v. *Commissioner, supra; Goldberg* v. *Commissioner, supra; Dillon* v. *Commissioner, supra,* and *Delsing* v. *United States, supra,* involved the same basic fact situation as does the petitioner's case—i.e., construction of rental housing units under wartime government regulations restricting sales and the subsequent liquidation of the rental housing units with a minimum of sales activity. Among the cited cases from the Sixth and Ninth Circuits, decided adversely to the taxpayer, *Homann* v. *Commissioner, supra; Pacific Homes, Inc.* v. *Commissioner, supra; Dougherty* v. *Commissioner, supra;* and *Rollingwood Corp.* v. *Commissioner, supra,* involved the same basic fact situation as does the petitioner's case.

2. The decision of the Tax Court in petitioner's case, as affirmed by the Sixth Circuit, appears to be based on the petitioner's piecemeal liquidation of the Detroit project. To the extent, however, that the decision, as affirmed, was based on a conclusion that the Detroit project was held from its completion primarily for sale to customers in the ordinary course of petitioner's trade or business, it is in conflict with the Fifth Circuit's interpretation of the meaning of

"primarily". In the Fifth Circuit the question of the meaning of "primarily" in section 117(j)(1)(B) was specifically discussed and decided in *United States* v. *Bennett,* 186 F. (2d) 407 (CA 5th, 1951). Rejecting a contention in that case that "primarily" meant "ultimately", the Court said:

> "If the statute had been intended to mean what the collector contends for, the word 'primarily' would not have been in it. Since 'primarily' is in the statute, it seems clear to us that to hold, as the collector contends, that the main, the first, purpose of the keeping of these breeder cattle was for sale, does complete violence to the statute and to its purpose and intent." (411)

In conflict with the *Bennett* decision, *supra*, the opinion of the Ninth Circuit, in *Rollingwood Corp.* v. *Commissioner, supra,* states that "primarily" means "essential" or "substantial", not "principal" or "chief".

The existence of the conflict among the Circuits on the treatment of piecemeal liquidations of real estate investments was virtually admitted by the respondent in its brief in opposition to petition for certiorari in *Shearer* v. *Smyth,* 221 F. (2d) 478 (CA 9th, 1955), Docket No. 249, October Term, 1955, filed August 17, 1955, cert. den., 350 U.S. 840. This case involved the sale of vacant lots from a subdivision. Respondent's brief in opposition to petition for certiorari in the *Shearer* case stated that section 1237 of the Internal Revenue Code of 1954 provides new and detailed rules on whether gain from sale of lots of subdivisions is to be treated as ordinary income or capital gain and "sharply diminishes the future importance of cases, like the one here, arising under the 1939 Code." (Sec-

tion 1237 of the 1954 Code does not apply to sales of improved real estate, as in the petitioner's case. On this point, see Part I C, *infra.*) Respondent's brief then stated:

> "Accordingly, it has been determined that the Government will not seek certiorari in such recent Fifth Circuit cases as *Smith* v. *Dunn, supra,* (invoked by taxpayers as inconsistent with the instant decision, Pet. 10), and *Goldberg* v. *Commissioner,* decided June 21, 1955 (1955 C.C.H., par. 9519), in which taxpayers prevailed in claiming capital gain treatment on the ground that the real property involved was not held primarily for sale in the ordinary course of a business. The considerations underlying this determination apply equally here and lead us to submit that further review in this case is not warranted."

The existence of the conflict among the Circuits has also been recognized in an opinion by the Fifth Circuit. In *United States* v. *Robinson,* 129 F. (2d) 297 (CCA 5th, 1942), the Court stated:

> "We assume for the purpose of this case that the liquidation of the timber could have been conducted in such fashion and under such facts as that, though appellee had no personal connection with any of the activities, it might be held under the theories of representation and of substantial frequency, regularity, and continuity, advanced in some of the cases and pushed to extreme lengths in the Ninth Circuit, that sales of timber made by her agents, though entirely in liquidation, were sales of 'property held by her primarily for sale to customers in the ordinary course of her trade or business.' " (300)

B. If petitioner's case had been decided by the Third, Fifth, Seventh, or Eighth Circuit, petitioner would have prevailed

1. The scope of review exercised by the Third, Fifth, Seventh, and Eighth Circuits over Tax Court decisions and decisions of District Courts sitting without a Jury in cases like the petitioner's case is so broad as to permit a reversal of the adverse decision of the Tax Court in petitioner's case. This point is discussed in greater detail in Part II hereof. It suffices at this point to note that the Seventh Circuit has specifically decided that the application of section 117(j)(1)(B) to a given fact situation is a conclusion of law, *Three States Lumber Co.* v. *Commissioner,* 158 F. (2d) 61 (CA 7th, 1946); *Chandler* v. *United States, supra;* that the Third Circuit has ruled that its application is an "ultimate fact" not subject to Rule 52(a) of the Federal Rules of Civil Procedure, *Curtis Company* v. *Commissioner, supra,* and that the Fifth Circuit has reached substantially the same conclusion. *Galena Oaks Corp.* v. *Scofield,* 218 F. (2d) 217 (CA 5th, 1954); *Goldberg* v. *Commissioner, supra; Consolidated Naval Stores Co.* v. *Fahs, supra;* and *Smith* v. *Dunn, supra.* The Eighth Circuit has reached the same result, in reversing a Tax Court decision involving the sale of rental housing units constructed during the war under the same basic facts to those in petitioner's case, under the "clearly erroneous" rule. *Dillon* v. *Commissioner, supra.*

The "two-court" rule (*Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271 (1949)) does not apply to this case because the issues involve conclusions of law (see the cases cited in the preceding paragraph), and because petitioner's adoption of respondent's statement of facts (page 3, *supra*), by putting respondent's

case in the most favorable light, resolves any issue of fact which might have been subject to the "two-court" rule.

2. The fact that petitioner's sales of rental housing units from the Detroit project were frequent, continuous, and substantial in 1946, cited in the Tax Court's opinion (15a), would not, under the circumstances of this case, be a factor pointing toward the holding of such units primarily for sale to customers in the ordinary course of the petitioner's trade or business. A piecemeal liquidation of a substantial real estate investment must, by its nature, result in frequent, continuous, and substantial sales, regardless of whether or not the taxpayer is holding the property primarily for sale to customers in the ordinary course of his trade or business. In *Goldberg* v. *Commissioner, supra,* the Fifth Circuit disposed of the test of volume and frequency of sales by pointing out that, "the corporation had a lot of houses to sell." See also *Curtis Company* v. *Commissioner, supra,* and *Ross* v. *Commissioner,* 227 F. (2d) 265 (CA 5th, 1955). The Fifth Circuit has stated that frequency and continuity of sales are not conclusive in themselves. *Lobello* v. *Dunlap,* 210 F. (2d) 465 (CA 5th, 1954); *Fahs* v. *Crawford, supra.*

3. The Tax Court's decision in the petitioner's case contains the following statement (15a):

> "Although the sale activities by the petitioner in connection with the disposal of the properties were apparently limited to turning the matter over to a real estate broker and to a reliance upon two roadside signs for advertising purposes, it seems evident that a ready market existed and the absence of a more extensive sales campaign is therefore immaterial. *Nathan D. Goldberg, supra.*"

The Tax Court opinion subsequently states (16a):

> "The activities of petitioner and of the broker acting on its behalf in disposing of the Detroit units were sufficient to constitute a trade or business."

Taking these two statements in conjunction, it would appear that the Tax Court has gone beyond the decisions holding that property was held primarily for sale in the ordinary course of trade or business by reason of sales activities, by using the *absence* of sales activities to create a presumption of a ready market in which such activities are unnecessary. (*Nathan D. Goldberg,* 22 T.C. 533, cited as authority by the Tax Court, has been reversed by the Fifth Circuit. *Goldberg* v. *Commissioner, supra.*) The Tax Court then appears to have made an additional, implicit assumption that, if there had not been a ready market, the petitioner would have engaged in substantial sales activities, and on the basis of this reasoning it treated the petitioner as though it actually *did* engage in substantial sales activities. This is contrary to the analysis of the term "trade or business" by the Fifth Circuit in *Snell* v. *Commissioner*, 97 F. (2d) 891 (CCA 5th, 1938), in which the Court made the oftenquoted statement that,

> "The word, notwithstanding disguise in spelling and pronunciation, means busyness; it implies that one is kept more or less busy, that the activity is an occupation." (892)

As the Tax Court opinion states, petitioner's only activities were turning the matter over to a real estate broker and reliance upon two roadside signs (which were erected by the broker). Neither of these facts con-

stitute the conduct of a trade or business. Utilization of a broker under contract to sell property for a percentage commission is not a trade or business. *Smith* v. *Dunn, supra; Dunlap* v. *Oldham Lumber Company,* 178 F. (2d) 781 (CA 5th, 1950); *Fahs* v. *Crawford, supra; Dillon* v. *Commissioner, supra; Beck* v. *Commissioner,* 179 F. (2d) 688 (CA 7th, 1950). In *Curtis Company* v. *Commissioner, supra,* the Court stated,

> "It was also conceded that had taxpayer employed a firm of brokers to sell the properties for it the sales then would not be in the ordinary course of the taxpayer's business." (169)

Advertising limited entirely to two roadside "for sale" signs erected by the real estate broker does not constitute a trade or business. *McConkey* v. *United States, supra; Dillon* v. *Commissioner, supra.*

4. Discussing the applicable wartime regulations limiting sale of the rental units built by petitioner in the Detroit project and noting the application filed for permission to sell 22 of the units and the application filed for an increased sales price on certain units, the Tax Court stated that it was not convinced that the housing units which petitioner could have sold to war workers (but did not) "were acquired and held exclusively for investment purposes." (15a) The Tax Court then said that, at the very best, petitioner had "a dual purpose" and that, "In such a situation, it has been held that one of the essential purposes in acquiring or holding the property is the purpose of sale and that the profit on the sale cannot be treated as a capital gain." (16a)

In this discussion, the Tax Court contradicted its own finding of fact that, "Late in 1945 or early in 1946,

petitioner's officers decided to dispose of the properties of the Detroit project . . ." (8a) Also, it contradicted its finding of fact that, "The units sold in 1944 and 1945 were disposed of because of title difficulties and because of the poor condition of the units themselves." (8a) Furthermore, overriding the application for permission to sell some of the housing units is the fact that the houses were not, in fact, sold as a result of such permission. *Delsing* v. *United States, supra.*

The "dual purpose" concept in the Tax Court opinion, quoted above, and the reference to acquisition "exclusively" for investment purposes flatly violate the meaning of "primarily". The Fifth Circuit has specifically held that "primarily" does not mean "ultimately". *United States* v. *Bennett, supra.* (Cf. *Rollingwood Corp.* v. *Commissioner, supra.*)

C. Important questions of Federal law are presented which have not been, but should be, settled by this Court

The large number of cases involving an application of section 117(j)(1)(B) of the 1939 Code which have arisen in the Tax Court and in the District Courts and the large number of appeals from these decisions show (1) that the issue is of widespread importance in the application of the Federal income tax, and (2) that the lower courts have been unable to resolve the legal questions involved in the application of the law in this area without guidance from this Court.* The area of doubt as to the application of the phrase "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" is so broad as to encompass all types of properties used

* Since 1950 at least 135 Tax Court cases, 63 reported District Court cases, and 39 decisions of Courts of Appeals have passed upon this section pertaining to real estate only. In addition, there have been other, unreported District Court cases.

in business—not merely real estate. The fact that the law must be applied to varied fact questions does not suffice to explain either the multitude of cases or the widely divergent results, particularly in cases (like petitioner's) involving the piecemeal liquidation of rental housing projects built under wartime restrictions on sales.

This is a continuing problem under section 1231 of the 1954 Code. While section 1237 of the 1954 Code provides detailed mechanical rules for the handling of a narrow group of cases, the 1954 Code leaves the basic issue unresolved, as before.

Section 1237 does not apply to improved real estate, such as that involved in the numerous conflicting Circuit Court decisions on liquidation of rental housing projects. Even with respect to unimproved real estate, section 1237 of the 1954 Code provides something less than a complete solution. Professor Surrey has stated with reference to the new section 1237 ("Definitional Problems in Capital Gains Taxation", 69 Harv. Law Rev., p. 985, at p. 991):

> "Congress in 1954 added a section covering a page and a half which resolves only to few situations and in doing so manages to create a great many problems. Moreover, the section is essentially limited to unimproved land."

Under these circumstances it is respectfully submitted that this Court has not, but should, provide authoritative rules for the application of section 117 (j)(1)(B) of the 1939 Code and its counterpart, section 1231 (b)(1)(B) of the 1954 Code. Specifically, it is important for taxpayers and the Internal Revenue Service to know whether it is possible to carry out a

piecemeal liquidation of a real estate property (or other type of property) without being treated as holding such property primarily for sale to customers in the ordinary course of trade or business, and whether the word "primarily" means "principal" or "chief", on the one hand, or "essential" or "substantial" or "ultimately", on the other hand.

II. ON THE QUESTION OF WHETHER THE APPLICATION OF SECTION 117(j)(1)(B) OF THE 1939 CODE TO A GIVEN FACT SITUATION IS REVERSIBLE ON APPEAL ONLY IF "CLEARLY ERRONEOUS":

A. There is a conflict among Circuits

In *Three States Lumber Co.* v. *Commissioner, supra,* the Seventh Circuit ruled that the question of whether selling parcels of cut-over timber land constituted the holding of property primarily for sale to customers in the ordinary course of trade or business was a conclusion of law and subject to review as such. In *Curtis Company* v. *Commissioner, supra,* the Third Circuit ruled that the question of whether sales of houses and sales of unimproved land by the taxpayer involved property held "primarily for sale to customers in the ordinary course of his trade or business" was not subject to the "clearly erroneous" provision of Rule 52(a) of the Federal Rules of Civil Procedure. The Fifth Circuit reached substantially the same conclusion in *Galena Oaks Corp.* v. *Scofield, supra*:

> "Insofar, however, as the so-called 'ultimate fact' is simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts, it is 'subject to review free of the restraining impact of the so-called "clearly erroneous" rule.' *Lehmann* v. *Acheson,* 3 Cir., 206 F. (2d) 592, 594. As succinctly stated by Professor Moore, 'Findings

> of fact that are induced by an erroneous view of the law are not binding. Nor are findings that combine both fact and law, when there is error as to the law.' 5 Moore's Federal Practice, 2d ed., Sec. 52.03(3), p. 2631." (219)

The opinion in the *Galena Oaks* case has been quoted with approval and acted upon in subsequent Fifth Circuit decisions. *Goldberg* v. *Commissioner, supra; Consolidated Naval Stores Co.* v. *Fahs, supra; Smith* v. *Dunn, supra.*

The *Three States Lumber Co.* decision was followed in the subsequent Seventh Circuit decision in *Chandler* v. *United States, supra.*

The Sixth, Ninth, and Tenth Circuits have reached the opposite conclusion that the application of section 117(j)(1)(B) is a question of fact. *Shepherd* v. *United States,* 231 F. (2d) 445 (CA 6th, 1956); *Winnick* v. *Commissioner,* 223 F. (2d) 266 (CA 6th, 1955); *Cohn* v. *Commissioner,* 226 F. (2d) 22 (CA 9th, 1955); *Dougherty* v. *Commissioner, supra; Friend* v. *Commissioner,* 198 F. (2d) 285 (CA 10th, 1952); *Rollingwood Corp.* v. *Commissioner, supra; Rubino* v. *Commissioner,* 186 F. (2d) 304 (CA 9th, 1951), cert. den. 342 U.S. 829.

In petitioner's case the Sixth Circuit specifically based its decision on the conclusion that the question was one of fact, citing *Rubino* v. *Commissioner, supra; Dougherty* v. *Commissioner, supra;* and *Shepherd* v. *United States, supra.* (Appendix B, *infra.*) But see *E. H. Sheldon & Co.* v. *Commissioner,* 214 F. (2d) 655, 658, 659 (CA 6th, 1954), in which the Sixth Circuit apparently reached the opposite conclusion.

Although the taxpayer in *Rubino* v. *Commissioner, supra,* petitioned this Court for a writ of certiorari

to the Ninth Circuit (which petition was denied), this point was not raised in the petition (Docket No. 53, October Term, 1950, petition filed May 7, 1951).

B. An important question of Federal law is presented which has not been, but should be, settled by this Court

The importance of such a question is indicated by one of the reasons given by this Court when it granted certiorari in the case of *Dobson* v. *Commissioner*, 320 U.S. 489 (1943): "Questions important to tax administration were involved . . ." The subsequent Act of Congress by which the scope of appellate review of Tax Court decisions was equated with that of District Courts sitting without a jury (section 36, Public Law No. 773, 80th Cong., 2nd Sess., amending section 1141(a) of the Internal Revenue Code of 1939, now section 7482(a) of the 1954 Code) has left unresolved the scope of review of Tax Court (or District Court) decisions applying definitions in the tax statutes to findings of fact—with the resulting conflict noted above.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATUTES

Internal Revenue Code of 1939

SEC. 117 CAPITAL GAINS AND LOSSES.—[effective with respect to the calendar years 1946-1949]

* * *

(j) GAINS AND LOSSES FROM INVOLUNTARY CONVERSION AND FROM THE SALE OR EXCHANGE OF CERTAIN PROPERTY USED IN THE TRADE OR BUSINESS.—

(1) DEFINITION OF PROPERTY USED IN THE TRADE OR BUSINESS.—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. Such term also includes timber with respect to which subsection (k)(1) or (2) is applicable. Such term also includes livestock, regardless of age, held by the taxpayer for draft, breeding, or dairy purposes, and held by him for 12 [6] months or more from the date of acquisition.

(2) GENERAL RULE.—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the

threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

(A) In determining under this paragraph whether gains exceed losses, the gains and losses described therein shall be included only if and to the extent taken into account in computing net income, except that subsections (b) and (d) shall not apply.

(B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

• • •

SEC. 1141. COURTS OF REVIEW.

(a) JURISDICTION.—The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in Section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 1254 of Title 28 of the United States Code.

• • •

Internal Revenue Code of 1954

SEC. 7482. COURTS OF REVIEW

(a) JURISDICTION.—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

* * *

Federal Rules of Civil Procedure

RULE 52. FINDINGS BY THE COURT

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient, if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

* * *

APPENDIX B

Judgment Below

HARRY SLATKIN BUILDERS, INC., *Petitioner*

vs

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

ORDER

(Filed June 14, 1956)

This case came on to be heard on the record and briefs and oral arguments of counsel:

And it appearing that the controlling question in the case is whether the dwelling units sold by petitioner during the years 1946 to 1949, inclusive, were held by petitioner for investment or held by petitioner primarily for sale to its customers in the ordinary course of its business, Internal Revenue Code (1939), Section 117(a)(1), 117 (j)(1);

And it appearing that this is a question of fact, *Rubino* v. *Commissioner of Internal Revenue*, 186 Fed. (2d) 304 (C.A. 9), certiorari denied 342 U.S. 814; *Dougherty* v. *Commissioner of Internal Revenue*, 216 Fed. (2d) 110, 111 (C.A. 6); *Paul W. Shepherd, Jr.* v. *United States of America*, 231 Fed. (2d) 445 (C.A. 6);

And it appearing that the findings of the Tax Court are not clearly erroneous;

IT IS ORDERED that the decision of the Tax Court be and it hereby is affirmed.

Approved for entry:

/s/ FLORENCE E. ALLEN
United States Circuit Judge

APPENDIX C

Counter-Statement of Facts in Brief for the Respondent Before the Sixth Circuit

The taxpayer's statement (Br. 2-9) contains argumentative matter and only partially accords with, and does not fully reflect, the essential facts as found by the Tax Court (R. 3a-12a).[1] A re-statement is therefore made as follows (R. 4a-12a):

The taxpayer was incorporated under the laws of the State of Michigan in 1931 under the name of Nine Minute Auto Wash, Inc. On or about April 2, 1935, its corporate name was changed to Harry Slatkin, Inc., and its charter was further amended to include as an authorized activity the business of building and general contracting and all other acts incident and necessary thereto. On or about June 6, 1941, the taxpayer's name was changed to Harry Slatkin Builders, Inc. (R. 4a.)

The taxpayer kept its books and records and filed its federal tax returns on the accrual basis for taxable years ending December 31. Timely income tax returns for the years 1946 to 1949, inclusive, were filed with the Collector of Internal Revenue for the District of Michigan at Detroit. In its 1943 return the taxpayer described its business as that of "general contractors and real estate." In 1944 and 1945 it used the description "building contractors," in 1946 "general building contractors," and in 1947, 1948 and 1949 "general contractors." (R. 4a.)

In 1941 the taxpayer commenced the construction of one-family frame houses for sale, financing them by short-term construction loans secured by mortgages on the properties. These houses were sold either during construction or upon completion. With the imposition of wartime regulations

[1] Record references are to the appendix to the taxpayer's brief, separately bound.

upon residential construction, the taxpayer submitted numerous applications to the War Production Board (hereinafter referred to as WPB), for the approval of construction of single houses for sale. Pursuant to such approval, the taxpayer constructed the following single houses, which were sold during construction and upon completion (R. 4a):

Year	Number of Houses	Approximate Average Sales Price	Approximate Sales
1941	15	$5,000	$ 75,000
1942	46	5,000	230,000
1943	101	5,850	590,000
1944	65	6,700	435,000
1945	15	6,700	100,000
1946	76	8,000	608,000

The advent of World War II, with the consequent mobilization of industry in Detroit for war production, created a demand for labor far in excess of the local supply and the resulting immigration of defense plant workers created a serious housing shortage. Government restrictions were imposed on building materials and regulations were issued by the National Housing Agency (hereinafter referred to as the NHA) respecting the construction of houses for war workers. Builders were required to apply to the WPB for approval of residential projects in order to obtain priorities for materials entering into such construction. Building specifications and arrangements for financing of such housing were subject to the approval of the Federal Housing Administration (hereinafter referred to as the FHA). (R. 5a.)

Under the NHA regulations effective as of November 17, 1943, private war housing begun on or after February 10, 1943, could be disposed of only to a war worker occupant who had been such for two months or to an eligible war worker if such sale was made within fifteen days after the issuance by the FHA of its completion report. Only one-third of a promoter's houses could be sold under

the second method and then only at prices not in excess of maximums previously approved by the NHA. Regional representatives of the NHA were authorized to relax such requirements under certain circumstances. (R. 5a.)

In 1943 the taxpayer submitted four applications to the WPB for the construction of two defense housing rental projects. Three of the applications concerned the proposed construction of 84 family dwelling units in 42 duplex buildings on Evergreen Road between Westfield Street and Joy Road in Detroit, hereinafter referred to as the Detroit project. The fourth application was with respect to the construction of 44 family dwelling units, consisting of 22 duplex buildings, on Outer Drive between Wilson and Lawrence Streets in the City of Dearborn, a suburb of Detroit, hereinafter referred to as the Dearborn project. (R. 5a.) Pertinent information with respect to the applications for the Detroit project is as follows (R. 6a):

Date of Application	Date Approved	Number of Family Dwelling Units	Monthly Shelter and Services Charges Requested and Approved	Sales Price Requested and Approved
1/ 8/43	3/ 6/43	44	$56	$6,000
7/30/43	9/10/43	30	56	None
9/16/43	10/16/43	10	54	None

The $6,000 sales price under the application dated January 8, 1943, was with respect to only 22 of the 44 units involved. Construction of the units under this application was commenced in May of 1943 and they were completed between September 1943 and January 1944, inclusive. Construction of the units under the applications of July 30, 1943, and September 16, 1943, was completed during the period from June, 1944, to December, 1944, inclusive, except that only eight units were constructed under the latter application rather than the ten which had been approved. (R. 6a.)

On August 12, 1943, a petition for change in stipulated rental or sales price and a petition to rent war housing begun prior to February 10, 1943, were submitted to the NHA with respect to the 44 units covered by the application of January 8, 1943. These petitions were approved on or about August 30, 1943, resulting in an increase of the monthly rental of these units to $60.50 and the granting of permission to rent the 22 units originally designated for sale. (R. 6a.)

On August 20, 1943, an application for the approval of the construction of 44 family dwelling units consisting of 22 duplex buildings in the Dearborn project was submitted to the WPB and was approved on September 7, 1943. The approval authorized a charge of $56 for both shelter and tenant services but since no sales price was sought to be established, none was fixed. All 44 of the units in the Dearborn project were initially rented by the taxpayer under the war housing regulations and have been rented continuously up to the present time. (R. 6a-7a.)

On October 1, 1943, the taxpayer prepared an application for submission to the WPB for approval of the construction of 36 duplex buildings (72 family dwelling units) on Woodworth and Ternes Streets between Michigan Avenue and Gildow Street in Dearborn, Michigan. This application was not submitted because the taxpayer was unable to acquire the land upon which it proposed to construct such units. (R. 7a.)

On March 15, 1944, petitions were filed with the NHA for the approval of increases in the monthly rental charges and the sales prices of the units in both the Detroit and the Dearborn projects. The relief requested and that approved was as follows (R. 7a):

(a) Two petitions, one for an increase in rent and the other for an increase in selling price, were filed for the 30 units in the Detroit project covered by the application of July 30, 1943. The applications sought the establish-

ment of a sales price for 20 of the units of $6,400 and an increase in the stipulated rent, including that for tenant services, to $61. A monthly rental charge of $59 was approved on April 27, 1944, and a sales price of $6,125 was approved on September 7, 1944. (R. 7a.)

(b) A petition for the establishment of a sales price of $6,400 for five of the eight units of the Detroit project constructed under the application of September 16, 1943, was submitted on or about March 15, 1944, but was approved on September 7, 1944, only to the extent of $6,125. The remaining three units were designated for rent. (R. 7a.)

(c) A petition for an increase in the total charge for rent of the 44 units in the Dearborn project from $56 to $61 was submitted on or about March 15, 1944, and was approved on April 27, 1944, in the amount of $59. (R. 7a.)

Two of the 82 units constructed by the taxpayer in the Detroit project were sold upon completion in 1944, and the remaining units were rented until sold as follows (R. 8a):

Year sold	Number of units
1945	3
1946	73
1947	1
1948	1
1949	2
	80

The units sold in 1944 and 1945 were disposed of because of title difficulties and because of the poor condition of the units themselves. (R. 8a.)

The Dearborn project proved to be much more profitable that the Detroit project, each unit therein showing a net return for 1945 of $138.30, whereas the units in the Detroit project produced only $66.70 each in that year. The difference was due both to a lower tax rate on the Dearborn properties and to the fact that the tenants in the Detroit

units paid little or no attention to the maintenance of their premises and disregarded the efforts of the taxpayer's caretaker to maintain the properties. Because of this lack of care, the taxpayer's officers concluded that the Detroit units were deteriorating rapidly and that the net return was even less than that shown by the books. (R. 8a.)

On October 15, 1945, all Government restrictions with respect to the disposition of the dwelling units in the two projects were removed but the ceilings on rents were retained. Late in 1945 or early in 1946, the taxpayer's officers decided to dispose of the properties of the Detroit project and discussed their sale with a real estate broker, Paul Frischkorn. Frischkorn was the nephew of the president of Frischkorn Construction Company, which built homes having an excellent reputation in the Detroit area. Early in 1946 the broker was instructed to proceed with the sale of the Detroit units but since he and the taxpayer's officers were friends, no written agreement was entered into. Two large roadside signs were erected on the project which advertised the properties to be sold under the name of Frischkorn and gave the broker's telephone number. However, purchasers were informed, at least by the time of the closing, that the homes had been built by the taxpayer. Although the broker occasionally discussed the sales prices with the taxpayer's officers, the latter remained in control of the disposition of the houses and the prices were changed by them from time to time. (R. 8a-9a.) The 77 remaining units were disposed of as follows (R. 9a):

1946	Units
January	2
February	14
March	16
April	8
May	6
June	6
July	7
August	8
September	2
October	3
November	0
December	1
Total	73
October 1947	1
May 1948	1
January 1949	2
	77

The sales prices in 1947 ranged from approximately $6,700 to approximately $7,300. The broker personally sold 71 of the 77 units offered for sale. (R. 9a.)

Since the early part of 1946, the taxpayer has engaged in a number of real estate projects apart from the continued rental of the units of the Dearborn project. They included the acquisition of certain undeveloped land on March 22, 1946, in Detroit, on which it was proposed to construct a housing project, and the making of a deposit on November 16, 1946, of $500 towards the purchase of land in Dearborn adjacent to its rental project for the purpose of constructing multiple dwellings. Both projects had to be abandoned due to the inability of the taxpayer to obtain a reclassification of the applicable zoning restrictions. (R. 9a-10a.)

In the latter part of October, 1947, the taxpayer purchased land in Detroit in the vicinity of Southfield Road and the Chesapeake and Ohio Railroad line and had preliminary sketches prepared for a proposed housing project to be erected on this parcel. However, due to the proximity of the railroad, the taxpayer was unable to obtain financing for the project. (R. 10a.)

In January of 1948, the taxpayer caused the formation of three corporations for the purpose of owning and operating housing projects on a tract of land acquired by the taxpayer in Dearborn. Mortgage insurance for the construction loans was obtained from the FHA under the provisions of section 608 of Title VI of the National Housing Act. The taxpayer received the entire outstanding common stock of the three corporations in exchange for a conveyance of the land. The entire authorized preferred stock of the corporations was issued to FHA. The construction of the project was completed during 1949 and 1950. The number of units and the cost were as follows (R. 10a):

Subsidiary	Number of Units	Construction Cost
Oxford Apartments, Inc.	32	$285,399.32
Vassar Apartments, Inc.	56	504,567.56
Columbia Apartments, Inc.	28	248,517.85

The dwelling units contained in each of the projects were rented upon completion and have been rented continuously since that time by the respective corporations. (R. 10a.)

In connection with the foregoing development, the taxpayer constructed in its own name a four-family flat on Madison Street in Dearborn at a total cost of $31,496.89, for which no financing was required. The building was rented upon completion and has been rented continuously by the taxpayer ever since. In 1950 the taxpayer completed the construction of a retail store building at a cost of $123,212.49 on land owned by it at Plymouth Road and Rutland Street in Detroit. This building was rented upon completion to the Kroger Grocery Company under a five-year lease executed in 1949 with a provision for renewal. The land upon which the building was erected had been acquired by the taxpayer as part of a larger tract known as Harry Slatkin Plymouth Subdivision, and the balance of this tract was used by the taxpayer in the construction of approximately 110 houses for sale. (R. 10a-11a.)

In 1950 the taxpayer acquired a tract of land in Royal Oak, Michigan, another suburb of Detroit, and in 1952 completed the construction thereon of a housing project of 25 family units known as Webster Terraces at a cost of $277,050.89. Each of the units was rented upon completion and had been rented continuously at the time of the hearing. (R. 11a.)

In 1952 the taxpayer acquired another tract of land in Royal Oak and commenced the construction thereon of 40 duplex buildings (80 family dwellings) at an estimated cost of $880,000. Approximately one-half of the dwelling units had been completed at the time of the hearing and were being rented by the taxpayer. In addition, two brick buildings constructed by the taxpayer in 1950 on land owned by it on James Couzens Highway in Detroit at a cost of $59,271.25 were also being rented. (R. 11a.)

The taxpayer's gross sales, exclusive of the sales involved in this proceeding, and the taxpayer's gross income from rents for the taxable years 1941 to and including 1952 were as follows (R. 11a, 12a):

Year	Gross Sales	Gross Income From Rents
1941	$ 72,372.25	.....
1942	230,752.52	.....
1943	590,270.67	$ 6,824.25
1944	434,360.48	55,409.80
1945	97,404.36	76,258.98
1946	853,510.73	47,385.06
1947	675,405.71	32,470.83
1948	447,328.95	34,182.89
1949	1,186,120.85	33,417.00
1950	1,260,820.98	44,444.11
1951	2,133,940.00	53,994.06
1952	3,239,658.02	66,994.04

During the years 1949 to and including 1952, the total income from rents received by the three corporations organized in 1948, all of the common stock of which was owned by the taxpayer, was as follows (R. 12a):

Year	Income from Rents
1949	$ 22,586.11
1950	122,954.26
1951	122,458.60
1952	123,597.90

The amounts of gain in each year from the sale of the 77 family dwelling defense housing units (Detroit project) during the years 1946 through 1949, some of which were reported on the installment method under Section 44 of the Internal Revenue Code of 1939, were $84,822.79, $22,015.92, $17,326.22 and $11,835.02, respectively. (R. 3a.) The Commissioner determined that such gains constituted ordinary income and declined to permit the taxpayer to treat them as long-term capital gains, determining deficiencies in tax for each of such years accordingly. (R. 21a.) The Tax Court found that the dwelling units constituting this project and sold by the taxpayer during the years 1946 to 1949, inclusive, were held by it primarily for sale to its customers in the ordinary course of its trade or business, and entered its decision accordingly. (R. 18a, 19a.) From this decision the taxpayer has petitioned this Court for a review. (R. 84a.)

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 493

HARRY SLATKIN BUILDERS, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 3a-18a)[1] is not reported. The *per curiam* opinion of the Court of Appeals (Pet. 4a) is reported at 235 F. 2d 189.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1956. (Pet. 4a.) Taxpayer's petition for rehearing was denied on July 11, 1956. The petition

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[1] Record references are to the appendix to taxpayer's brief in the court below.

for a writ of certiorari was filed on October 9, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether, on the facts of this case, the two courts below were correct in finding that the property involved was held primarily for sale to customers in the ordinary course of the taxpayer's trade or business with the consequence that the profits from its sale were taxable as ordinary income.

STATUTE INVOLVED

Sections 22(a) and 117(a)(1) and (j)(1) and (2) of the Internal Revenue Code of 1939 [2] are set forth in the Appendix, *infra*, pp. 9-11.

STATEMENT

A full statement of the facts appears in Appendix C to the petition (Pet. App. 5a). They may be briefly summarized as follows.

1. *The housing units here involved.* This case concerns the tax on the profit from the sale of 77 dwelling units of what is referred to as the "Detroit project". Construction of these units was completed at various times in 1943 and 1944 (R. 6a). Two units of the project were sold upon completion in 1944. Three were first rented and then sold in 1945. These sales were made because of title difficulties and the poor condition of the units (R. 8a). The 77 units here involved were all first rented by taxpayer. At that time there were governmental regulations both establishing rent

[2] Unless otherwise noted references to the "Code" or "Internal Revenue Code" will be to the Internal Revenue Code of 1939.

ceilings and restricting the sale of these units to war workers meeting certain qualifications.

On October 15, 1945, all governmental restrictions respecting disposition of these housing units were removed, but rent ceilings continued. Shortly thereafter, because of the low income being obtained from the Detroit project and because of the deteriorating condition of the buildings, taxpayer decided to sell all units of that project. Early in 1946 taxpayer made an oral arrangement with a broker and two large signs were erected on the property advertising the sale of the houses under the broker's name. The project was sold not as an entity but to individual buyers of the separate units. The sales of the 77 units were spread over a substantial period of time as follows (R. 9a):

1946	Units
January	2
February	14
March	16
April	8
May	6
June	6
July	7
August	8
September	2
October	3
November	0
December	1
Total	73
October 1947	1
May 1948	1
January 1949	2
	77

2. *Related business activities of taxpayer.* Since 1941 taxpayer has been active in the construction, sale and renting of housing. Simultaneously with the construction of the Detroit project taxpayer built a Dearborn project of 44 units. All of these units have been rented continuously by taxpayer until the present time (R. 6a-7a). Three subsidiary corporations, of which

taxpayer owns all the common stock, built housing projects in 1949 and 1950 of 28, 32 and 56 units, respectively. These units were rented upon completion and have been rented continuously since that time (R. 10a).

Throughout the period, however, the bulk of taxpayer's gross income was from the construction and sale of housing. Taxpayer's gross sales, exclusive of the sales involved in this proceeding, and taxpayer's gross income from rents for the taxable years 1941 to and including 1952 were as follows (R. 11a-12a):

Year	Gross Sales	Gross Income from Rents
1941	$ 72,372.25	.....
1942	230,752.52	.....
1943	590,270.67	$ 6,824.25
1944	434,360.48	55,409.80
1945	97,404.36	76,258.98
1946	853,510.73	47,385.06
1947	675,405.71	32,470.83
1948	447,328.95	34,182.89
1949	1,186,120.85	33,417.00
1950	1,260,820.98	44,444.11
1951	2,133,940.00	53,994.06
1952	3,239,658.02	66,994.04

A more detailed statement of the facts regarding taxpayer's activities in the construction, selling and renting of housing is given in the appendix to the petition (Pet. App. 5a-14a).

3. *Rulings below.* During the years 1946 to 1949 taxpayer realized gains on the sale of 77 units of the Detroit project totalling $135,999.95 (R. 3a). The Commissioner determined that these gains constituted ordinary income and declined to permit the taxpayer to treat them as long-term capital gains (R. 21a); accordingly, the Commissioner determined deficiencies in tax for each of those years (R. 3a). The Tax Court found that the dwelling units constituting the Detroit project and sold by taxpayer during the

years 1946 to 1949, inclusive, were held by taxpayer primarily for sale to its customers in the ordinary course of its trade or business (R. 12a) and sustained the deficiencies in dispute (R. 19a) for the reasons stated in its opinion (R. 13a-18a).

The court below affirmed *per curiam* (Pet. 4a).

ARGUMENT

The decision below was correct and turns on the particular facts of the case; there is no conflict among the courts of appeals as to the proper standard in reviewing the factual determinations involved in this class of cases.

1. The court of appeals below was correct in holding (Pet. 4a)—

> that the controlling question in the case is whether the dwelling units sold by petitioner during the years 1946 to 1949, inclusive, were held by petitioner for investment or held by petitioner primarily for sale to its customers in the ordinary course of its business, Internal Revenue Code (1939), Section 117(a)(1), 117(j)(1); * * *

and (Pet. 4a) "that this is a question of fact". Determination by the courts below of a question of this nature presents no adequate ground for certiorari.

The Tax Court pointed out the types of facts which are controlling (R. 14a-15a):

> in determining whether or not property is held primarily for sale or for investment purposes, the courts have usually considered such factors as the purpose or nature of the acquisition of the property, the continuity of sales or sales related activities over a period of time, the frequency of the

> sales as opposed to isolated transactions, and the extent and substantiality of the transactions, as well as the activity of the seller or those acting under his instructions or on his behalf.

Thus whether or not in a particular case property is held primarily for sale to customers in the ordinary course of taxpayer's trade or business turns on many factual indicia and on the weight to be given each under the peculiar circumstances of a given record.[3]

The Government has, therefore, consistently emphasized the nature of the issue involved in cases of this kind and the inappropriateness of Supreme Court review. *Shearer* v. *Smyth*, 221 F. 2d 478 (C.A. 9), certiorari denied, 350 U.S. 840; *Rubino* v. *Commissioner*, 186 F. 2d 304 (C.A. 9), certiorari denied, 342 U.S. 814; *King* v. *Commissioner*, 189 F. 2d 122 (C.A. 5), certiorari denied, 342 U.S. 829. The same considerations underlay the Government's determination not to seek certiorari in *Smith* v. *Dunn*, 224 F. 2d 353 (C.A. 5), and *Goldberg* v. *Commissioner*, 223 F. 2d 709 (C.A. 5), both decided in 1955, and in the recent Third Circuit decision in *Curtis Co.* v. *Commissioner*, 232 F. 2d 167.

2. Without restating the circumstances in detail, we think it clear that the court below did not err in sustain-

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[3] Cases in the Courts of Appeal holding that no one test is decisive and that this question is one of fact, are legion, e.g., *Harriss* v. *Commissioner*, 143 F.2d 279 (C.A. 2); *Mauldin* v. *Commissioner*, 195 F.2d 714 (C.A. 10); *Victory Housing No. 2* v. *Commissioner*, 205 F.2d 371 (C.A. 10); *Home Co.* v. *Commissioner*, 212 F.2d 637 (C.A. 10); *Dillon* v. *Commissioner*, 213 F.2d 218 (C.A. 8); *Dougherty* v. *Commissioner*, 216 F.2d 110 (C.A. 6); *Winnick* v. *Commissioner*, 223 F.2d 266 (C.A. 6); *Cohn* v. *Commissioner*, 226 F.2d 22 (C.A. 9); *Homann* v. *Commissioner*, 230 F.2d 671 (C.A. 9); *Pacific Homes* v. *United States*, 230 F.2d 755 (C.A. 9); *Shepherd* v. *United States*, 231 F.2d 445 (C.A. 6).

ing the findings of the Tax Court (Pet. 4a). The Tax Court's determination was supported by taxpayer's frequent, continuous and substantial sales in 1946 (R. 15a), by taxpayer's disposal of all Detroit project units after controls on sales were lifted at prices much higher than those which were obtainable while controls were in effect (R. 15a), by the evidence that taxpayer had a dual purpose, namely, to rent the Detroit units only for so long a period as the rental income produced a better return than would the proceeds of a sale (R. 16a), by the activities of taxpayer and of the broker acting on its behalf sufficient to constitute a business (R. 16a), by the facts adduced with respect to taxpayer's post-war rental projects, showing that a very small fraction of its post-war income has been derived from rental properties compared to its income derived from sales. The Tax Court noted that taxpayer's activity in constructing and selling residential properties increased greatly during and after the war years, rising from approximately $72,000 in 1941 to $850,000 in 1946 and to over $3,000,000 in 1952 (R. 13a); that taxpayer continued in the business of constructing houses for sale throughout the period 1946 to 1952 and with the exception of 1945 its rental income was never more than five to ten percent of its income derived from sales exclusive of the sales here in issue (R. 17a). During 1950 to 1952 this percentage dropped to between two and five percent (R. 17a).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1956.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income * * * from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; * * * or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) [As amended by Section 115(b), Revenue Act of 1941, c. 412, 55 Stat. 687, and Section 151(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Definitions.*—As used in this chapter—

(1) *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), or an obligation of the

United States or any of its possessions, or of a State or Territory or any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue, or real property used in the trade or business of the taxpayer;

* * * * *

(j) [As added by Section 151(b), Revenue Act of 1942, *supra*] *Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction

in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. * * *

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(26 U.S.C. 1952 ed., Sec. 117.)

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